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No. 96-1590

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

FEDERAL ELECTION COMMISSION,
Petitioner,

v.

JAMES E. AKINS, RICHARD CURTISS, PAUL FINDLEY, ROBERT J. HANKS, ANDREW KILLGORE, AND ORIN PARKER,
Respondents.

On Writ of Certiorari
To The United States Court of Appeals
For The District Of Columbia Circuit

BRIEF *AMICUS CURIAE* OF THE AMERICAN ISRAEL PUBLIC AFFAIRS COMMITTEE IN SUPPORT OF NEITHER PARTY

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BRIEF *AMICUS CURIAE* OF THE AMERICAN ISRAEL PUBLIC AFFAIRS COMMITTEE IN SUPPORT OF NEITHER PARTY

INTEREST OF *AMICUS CURIAE*

The American Israel Public Affairs Committee ("AIPAC") is a nonprofit, tax-exempt (under 26 U.S.C. § 501(c)(4)) membership corporation with approximately 50,000 members nationwide in 1997. Its purpose is to maintain and improve friendship and goodwill between the United States and Israel.*

Respondents, six individuals who actively oppose AIPAC's efforts to strengthen U.S.-Israel relations, filed an administrative complaint against AIPAC with the Federal Election Commission ("FEC" or the "Commission") on January 9, 1989. They alleged numerous violations of the Federal Election Campaign

*This brief was not authored in whole or in part by counsel for any party, and no person other than AIPAC, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

Act of 1971 as amended ("FECA" or the "Act"), 2 U.S.C. §§ 431 *et seq.*, by AIPAC and others. The Commission dismissed respondents' complaint after a lengthy investigation. Respondents then initiated this lawsuit against the Commission.

This case has proceeded through the courts on the premise that the alleged conduct giving rise to this lawsuit -- AIPAC's election-related communications with its own members -- would be subject to regulation under FECA if (as the court below held) the "major purpose" test applied by the Commission is invalid. That crucial premise, however, is incorrect. As the organization whose alleged conduct is at issue in these proceedings, AIPAC has a direct interest in ensuring that a complete and accurate portrayal of the facts and issues is presented to the Court for its consideration.

Regardless of the validity or invalidity of the "major purpose" test, FECA does not apply to AIPAC's alleged conduct. That conduct consists entirely of communications by AIPAC to its own members, and FECA expressly exempts such communications from the category of conduct that can qualify an organization as a regulated "political committee." The Commission determined that AIPAC's members were not "members" within the meaning of this statutory exemption, but developments in the law since the issuance of that decision confirm the incorrectness of the Commission's ruling in that regard. Under the current state of the law, therefore, it is clear that AIPAC could not be found to have violated the Act even if the "major purpose" test were to be invalidated by this Court. That fact deprives the first question presented in the petition of any significance with respect to the parties and case actually before the Court, and demonstrates that the proper disposition of this case would be to vacate the judgment below and remand with directions to dismiss

the complaint or, in the alternative, to reconsider the antecedent membership issue.

AIPAC has a vital interest in ensuring that the Court's resolution of this case does not inadvertently cast doubt upon AIPAC's proper status as a membership organization constitutionally and statutorily entitled to communicate with its members about election-related matters and other subjects of interest and concern to them. Accordingly, AIPAC has respectfully submitted this *amicus curiae* brief to emphasize its status as a membership organization and to reveal the resulting absence of any concrete dispute over the validity of the "major purpose" test.

The Commission and respondents have consented to the filing of this *amicus* brief.

STATEMENT

I. Background

AIPAC is a tax-exempt, non-stock, non-profit membership corporation incorporated under the laws of the District of Columbia, and has a single class of members. Pet. App. 78a; FEC General Counsel's Brief ("G.C. Br.") 81;[1] D.C. Code Ann. §§ 29-512 through 29-514. AIPAC is dedicated to "'maintain[ing] and further[ing] the friendship between the United States and Israel and to strengthen[ing] and promot[ing] the mutual ideals and interests of both nations, *in accordance with the views of its members*.'" G.C. Br. 8, 77

[1] The General Counsel's Brief was incorporated by reference into the General Counsel's Report, which in turn formed the basis for the Commission's determination in this matter. *See* General Counsel's Report ("G.C. Rep.") 3; Pet. App. 98a. The General Counsel's Brief and Report are reproduced at pp. 88-195 and pp. 196-223, respectively, of the Joint Appendix filed by the parties in the court of appeals.

(emphasis added by General Counsel) (quoting AIPAC's Bylaws § 1(a)); Pet. App. 78a.

AIPAC's bylaws provide that individuals may become AIPAC members by completing a membership application, form, or card and by paying annual dues as set by AIPAC's Executive Committee. G.C. Br. 77-79. AIPAC's dues are $50 per year ($15 for students), except that the chief lay officers of certain major Jewish organizations may join without paying dues. G.C. Br. 78. "Membership must be renewed yearly [through the payment of dues]. AIPAC sends out five notices of late payment and then drops the individual from AIPAC's membership roles if payment is not made." G.C. Br. 80. AIPAC had 37,104 members in 1989, excluding student members, and received nearly $10 million in dues and contributions from its members in that year. G.C. Br. 80-81 n.30.[2]

AIPAC has a 190-member Executive Committee that oversees the affairs of the organization. G.C. Br. 85. AIPAC's officers and most members of the Executive Committee are nominated by the Nominating Committee and elected by majority vote of the Executive Committee to one-year terms (for Executive Committee members) or two-year terms (for officers). G.C. Br. 85-86. No member of the Executive Committee may serve more than 5 consecutive terms, and officers may not serve more than 3 consecutive terms. G.C. Br. 86, 89. Only AIPAC members are eligible to serve as officers or Executive Committee members.

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[2] Except as otherwise indicated, the facts described in this brief are based on the administrative record, and do not reflect developments (including organizational changes within AIPAC) that have taken place since the completion of the administrative proceeding.

AIPAC Bylaws, § 1(c)(1), *reproduced at* Admin. Rec. 1603.

The Nominating Committee consists of 7 AIPAC members appointed by AIPAC's President and other officers. G.C. Br. 87. A majority of the Nominating Committee may be made up of AIPAC members who do not sit on the Executive Committee. G.C. Br. 87. Any AIPAC member may propose or submit to AIPAC's President or other officers the name of any other AIPAC member for consideration for a position on the Nominating Committee. G.C. Br. 87. Nominations for the Executive Committee and other AIPAC offices are based upon an individual member's commitment to AIPAC. G.C. Br. 88. There is substantial lobbying on the part of AIPAC members for such positions, and many of AIPAC's Executive Committee members and officers "have essentially 'risen through the ranks.'" G.C. Br. 88-89.

AIPAC has "an array of regional boards, standing committees, state chairs, and key contacts" that offer individual members "an opportunity to participate in AIPAC's affairs." G.C. Rep. 19. Local committees of AIPAC members across the country assist AIPAC's "local and national staff in planning and implementing fundraising events, educational meetings, caucuses and workshops." G.C. Br. 91. Moreover, AIPAC's regional governing bodies (which have hundreds of AIPAC-member participants) meet frequently to hear reports "from AIPAC's regional and national staff and to review operations and activities of the regional office." G.C. Br. 91.

AIPAC members are entitled to various benefits of membership, including notification of AIPAC events and the opportunity to participate in AIPAC activities like receptions with AIPAC speakers, educational seminars, and regional political workshops. G.C. Br.

82-83. Members are also entitled to receive various AIPAC publications. G.C. Br. 83.

All AIPAC members are entitled to "attend and participate in its annual Policy Conference," where AIPAC's "policy for the next year is set." G.C. Rep. 19; G.C. Br. 9. All such members "have the opportunity to debate and vote on the Policy Statement," which plays an important role in governing AIPAC's activities for the next year and is regularly consulted by the organization's Executive Committee, officers, and staff. G.C. Rep. 19; G.C. Br. 85, 92. Individual members "also have the right to attend meetings of the Executive Committee, the National Council, and all standing and special committees." G.C. Rep. 19. In addition, they "may circulate and submit petitions for nomination to any AIPAC office including the Nominating Committee and the Executive Committee." G.C. Rep. 19.

AIPAC does not rate or endorse candidates for electoral office, engage in campaign fundraising, or establish, maintain, or control any political action committee. G.C. Br. 12-15, 17-21, 24-26 & n.9, 32. It does disseminate (to its members only) information about upcoming campaigns for federal and other public office, including candidate position papers, voting records, publicly available polling data, and summaries of financial disclosure information. G.C. Br. 8. This information is usually distributed to AIPAC members in summaries known as campaign updates. G.C. Br. 8. More generally, AIPAC endeavors to "educate AIPAC members 'about the electoral process and its impact on U.S.-Israel relations.'" G.C. Br. 30. AIPAC "'scrupulously limit[s] any and all communications that might remotely be considered partisan to those individuals who satisfy the requirements for membership in AIPAC, as defined by AIPAC's bylaws.'" G.C. Br. 96.

II. Administrative Proceedings

In January 1989, respondents filed a complaint with the Commission alleging numerous violations of FECA by AIPAC and by 27 Jewish political action committees. Pet. App. 77a-78a. The complaint alleged that (1) AIPAC is a "political committee" subject to FECA's registration and reporting requirements, 2 U.S.C. §§ 433 and 434; (2) AIPAC and the 27 political action committees were affiliated and therefore subject to combined reporting and expenditure limitations; (3) AIPAC failed to disclose election-related activity to the Commission; and (4) AIPAC made illegal campaign expenditures. Pet. App. 78a-79a.

The Commission rejected respondents' affiliation claim, finding "no reason to believe" that AIPAC was affiliated with the 27 political action committees. Pet. App. 79a-80a. Moreover, after an extensive investigation of respondents' allegations that AIPAC had engaged in impermissible election-related conduct, the Commission's General Counsel found that many of respondents' claims of election-related conduct by AIPAC were totally unsupported by credible evidence or were fully rebutted by AIPAC's detailed factual showings. G.C. Br. 62. With respect to the remaining allegations, the General Counsel determined that "[a]ll of these activities consist[] solely of communications to persons AIPAC considers its 'members.' Thus, whether or not these activities violate [FECA] depends on whether or not the persons AIPAC considers its 'members' qualify as members under the Act." G.C. Br. 65; *see also* G.C. Br. 21.

Finding that "most individuals who join AIPAC pay a minimum amount of $50 in annual dues" (G.C. Br. 97), the General Counsel concluded that (with the exception of the 45 chief lay officers of Jewish organizations who also serve on AIPAC's Executive Commit-

tee) "the apparent obligation of individuals to pay a minimum amount of dues to AIPAC on an annual basis constitutes a significant financial attachment." G.C. Br. 98. Moreover, the General Counsel found that "most individuals do take some affirmative steps to join AIPAC" and that "[w]ith the payment of dues, individuals are entitled to certain rights and privileges in AIPAC." G.C. Br. 99.

The General Counsel nevertheless concluded that AIPAC's members (other than the members of the Executive Committee) did not qualify as "members" under the Act because they did not have "sufficient rights in the governance of the organization." G.C. Br. 99-101. While conceding that even under the Commission's then-view of the law "it [wa]s a close question whether persons who belong to AIPAC qualify as members for purposes of the Act" (G.C. Rep. 19), the General Counsel reasoned that "the membership at large has no right or opportunity to elect persons to the Executive Committee or to elect AIPAC's officers. It is the absence of this right in the membership at large that we find most troublesome." G.C. Rep. 20-21. In the General Counsel's view, the absence of the right to elect AIPAC's leaders was dispositive, because "to treat all 37,000+ [AIPAC members] as members of AIPAC for purposes of the Act would indicate that the Commission is no longer using voting rights as a bright line test to establish membership under the Act." G.C. Rep. 21.

Based on his determination that AIPAC's members were not "members" within the meaning of FECA, the General Counsel concluded that AIPAC had made election-related communications to persons who were not "members" and therefore had made impermissible indirect in-kind corporate contributions under 2 U.S.C. § 441b, which prohibits any corporation from making contributions in connection with a federal election

(other than communications with the corporation's members or stockholders). G.C. Br. 2, 102. Accordingly, the General Counsel recommended that the Commission find probable cause to believe that AIPAC had violated Section 441b. G.C. Rep. 27; G.C. Br. 2, 102; Pet. App. 80a. The General Counsel recommended that the Commission find no probable cause to believe that AIPAC was a political committee subject to the registration and reporting requirements of 2 U.S.C. §§ 433 and 434, however, because "AIPAC's political activities did not rise to such a level as to make them a major purpose of the organization." G.C. Br. 2-3.

The Commission adopted the General Counsel's recommendations, concluding that AIPAC was not a "political committee" but finding probable cause to believe that AIPAC had violated 2 U.S.C. § 441b. Pet. App. 95a-96a. Noting that the General Counsel's analysis of the membership issue "principally cited the fact that group members at issue here had no right to vote for the governing body (the Executive Committee) of AIPAC," the Commission "agreed with the General Counsel's conclusion that AIPAC did not meet the Commission's membership criteria." Pet. App. 97a-98a. Finding that "the AIPAC situation presented a close question," however, and that "the Commission should clarify its membership definition before imposing penalties in close cases such as this," the Commission declined to take any enforcement action with respect to the Section 441b finding. *Id.* at 98a.[3]

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[3] After the Commission issued its final order resolving the administrative proceeding, AIPAC revised its organizational structure. As part of that organizational change, all AIPAC members now have the right to vote for a member of AIPAC's governing board. Thus, even under the standards

III. Judicial Proceedings

Respondents brought suit in the United States District Court for the District of Columbia seeking judicial review of the Commission's determination that AIPAC was not a "political committee" subject to the registration and reporting requirements of FECA. Pet. App. 81a. The district court granted summary judgment for the Commission, concluding that the Commission had acted reasonably in applying the "major purpose" test. Pet. App. 77a-93a.

A panel of the court of appeals affirmed, with Judge Silberman dissenting in part. Pet. App. 41a-74a. The majority applied circuit precedent to conclude that respondents had "informational standing" to challenge the Commission's determination, and held that the "major purpose" test was a valid interpretation of FECA and that the Commission correctly applied that test in this case.

On rehearing in banc, the court of appeals reversed and remanded, with two Judges dissenting. Pet. App. 1a-40a. The majority held that respondents had standing to seek judicial review and that the "major purpose" test was invalid. *Id.* at 1a-30a. In a dissenting opinion, Judge Sentelle (joined by Judge Henderson) concluded that respondents lacked standing to challenge the Commission's determination. The dissent explained that respondents had suffered no concrete injury as a result of the Commission's decision and could assert nothing more than a generalized grievance regarding the manner in which the Commis-

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applied by the Commission in the administrative proceeding, all of AIPAC's members would qualify as "members" under the Act.

sion had chosen to exercise its enforcement authority. *Id.* at 30a-40a.

SUMMARY OF ARGUMENT

The first question presented in the petition and accepted for review by this Court -- to wit, the validity *vel non* of the "major purpose" test -- need not and should not be resolved in this case. That question is one of constitutional dimension that would require the Court to determine whether the government's interest in compelled disclosure of contributor and expenditure information from organizations primarily involved in issue advocacy is sufficiently compelling to outweigh the serious First Amendment concerns raised by such disclosure in circumstances where a small proportion of the organization's activities involves "coordinated" campaign expenditures or "contributions" to a political candidate.

Resolution of that weighty constitutional issue should be avoided because a logically antecedent -- and, indeed, dispositive -- issue in this case is the question whether AIPAC's internal communications to its members are "expenditures" for purposes of FECA -- a question that turns on whether AIPAC's members qualify as "members" within the meaning of the Act. The Commission erroneously resolved that antecedent membership issue against AIPAC in 1992, but subsequent changes in the law make clear that even the Commission no longer adheres to the view of the law it applied to AIPAC. As a result, the validity of the "major purpose" test is not properly before the Court, because the resolution of that question would not affect the rights of the parties in this case. The proper course is therefore to vacate the judgment below with directions that respondents' complaint be dismissed or that the case be remanded to the Commission for a determination that AIPAC's members are "members" within

the meaning of FECA and that AIPAC's communications with those individuals regarding election-related matters are immune from government regulation.

ARGUMENT

I. THE VALIDITY OF THE "MAJOR PURPOSE" TEST IS NOT PROPERLY AT ISSUE IN THIS CASE

The first question presented in the petition is whether the court of appeals erred in rejecting the Commission's reliance on the "major purpose" test as a basis for concluding that AIPAC is not a "political committee" under FECA. That question is legally irrelevant in this case, however, if AIPAC's members qualify as "members" under FECA. That is so because the Act's definition of "political committee" is not even arguably triggered by an organization's expenditures aimed solely at communicating with its members, and thus there is no cause to consider the validity of the "major purpose" test in those circumstances. As discussed below, the Commission's determination that AIPAC's members are not "members" under the Act has been overridden by intervening legal developments, and accordingly there is no basis for addressing the "major purpose" test in this case.

A. The "Major Purpose" Test Is Not Implicated In This Case If AIPAC's Members Qualify As "Members" Within The Meaning Of FECA

FECA defines a "political committee" as "any committee, club, association, or other group of persons which . . . makes *expenditures* aggregating in excess of $1,000 during a calendar year." 2 U.S.C. § 431(4)(A) (emphasis added). Thus, regardless of the validity of the "major purpose" test, AIPAC cannot be a "political committee" if it did not make "expenditures" within the meaning of the Act.

FECA defines "expenditures" to include any payments "made by any person for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(9)(A)(i). The Act expressly excludes from the category of "expenditures," however, "any communication by any membership organization or corporation to its members." 2 U.S.C. § 431(9)(B)(iii); *see also* 11 C.F.R. §§ 100.8(b)(4), 114.3(a)(2).[4] To the extent, therefore, that AIPAC's challenged conduct involved communications by a membership corporation to its members, AIPAC did not make "expenditures" within the meaning of FECA.

It is clear that the alleged AIPAC conduct found to constitute "expenditures" by the Commission involved nothing more than communications by AIPAC to individuals who constitute AIPAC members in accordance with the organization's bylaws. Indeed, the General Counsel expressly found that "[a]ll of these [challenged] activities consist[] solely of communications to persons AIPAC considers its 'members.' Thus, whether or not these activities violate [FECA] depends on whether or not the persons AIPAC considers its 'members' qualify as members under the Act." G.C. Br. 65.

As the Commission conceded in its petition for certiorari, therefore, "[e]ven under the court of appeals' view of the statute, any finding that AIPAC is in viola-

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[4] Similarly, although FECA prohibits any corporation from making contributions or expenditures in connection with a federal election, communications by membership corporations to their members are exempt from this prohibition. 2 U.S.C. § 441b(b)(2); 11 C.F.R. §§ 114.1(j), 114.3(a)(2).

tion of the FECA provisions governing 'political committees' would depend upon the antecedent determination that the communications at issue are properly characterized as contributions -- *i.e.*, that they were sent to persons other than AIPAC's own members." Pet. 27 n.9. The membership issue is logically antecedent to the "major purpose" question presented in the petition and, if resolved in favor of AIPAC, would deprive the latter question of any possible significance in this case.

B. The Commission's Resolution Of The Antecedent Membership Question Has Been Superseded By An Intervening Change In The Law

The Commission found that AIPAC's members-at-large did not qualify as "members" within the meaning of FECA. Pet. App. 98a. The dispositive factor relied upon by the Commission in reaching this conclusion was the fact that AIPAC's members "had no right to vote for the governing body (the Executive Committee) of AIPAC." *Id.* Indeed, the Commission adopted the General Counsel's conclusion in this regard (*id.*), and the General Counsel made clear that his conclusion was in turn based on the Commission's use of "*voting rights as a bright line test to establish membership under the Act*." G.C. Rep. 21 (emphasis added).

The "bright line" voting rights test that the Commission applied to AIPAC was not set forth in the Commission's regulations at that time, and the Commission recognized in its statement of reasons that it "should clarify its membership definition before imposing penalties in close cases such as this." Pet. App. 98a. Accordingly, the Commission subsequently amended its regulations to codify its bright-line voting rights test for membership under FECA. 58 Fed. Reg. 45770 (Aug. 30, 1993). The new rule generally limited the category of "members" to those dues-paying members of an organization who "are entitled to vote directly either for at least one member who has fully participatory and voting rights on the highest governing body of the membership association, or for those who select at least one member of those on the highest governing body of the membership association." 11 C.F.R. § 114.1(e)(2)(ii). According to the Commission, this bright-line voting rights test was "consistent with past Commission advisory opinions and enforcement actions" addressing the membership issue. 58 Fed. Reg. at 45772.

In *Chamber of Commerce of U.S. v. Federal Election Comm'n*, 69 F.3d 600, 601 (D.C. Cir. 1995), *clarified on denial of reh'g*, 76 F.3d 1234 (D.C. Cir. 1996), the District of Columbia Circuit held that the Commission's bright-line voting rights requirement was invalid. The court explained that the First Amendment protects the right of organizations to communicate with their members and that "too restrictive a definition of member -- as the Commission's here -- would burden that right." *Id.* at 605 (citing *United States v. CIO*, 335 U.S. 106, 121 (1948)).

The court of appeals also reasoned that the Commission's regulation was inconsistent with this Court's decision in *Federal Election Comm'n v. National Right to Work Comm.*, 459 U.S. 197 (1982) (*"NRWC"*), which suggested that a "relatively enduring and independently significant financial *or* organizational attachment" is sufficient for membership status under the Act. 459 U.S. 204 (emphasis added). As the court of appeals explained, "by referring to a financial attachment, th[is] Court presumably implied something similar to dues." 69 F.3d at 605. The Commission's regulation, by contrast, expressly provided that the payment of dues was *not* sufficient in itself to confer membership status. *Id.*; *see* 11 C.F.R. § 114.1(e)(2)

(ii) (requiring payment of dues *plus* voting rights). Thus, the court of appeals concluded, the Commission had improperly read in the conjunctive this Court's disjunctive test for membership -- "financial *or* organizational attachment." *See* 69 F.3d at 605.

Moreover, the court of appeals held that the Commission's bright-line voting rights requirement improperly "ignore[d] other indications of organizational attachment." 69 F.3d at 605. Rejecting the Commission's single-minded focus on voting rights, the court noted that this Court had had "little difficulty in concluding that union members were 'members' without regard to their voting rights." *Id.* at 606. As an example of the type of "organizational attachment" that the Commission's rule improperly failed to recognize as significant, the court of appeals pointed to the fact that many members of the Chamber of Commerce "participate in [its] policy formulating committees, which for such an organization is clearly an important function." *Id.* at 605.

In response to the *Chamber of Commerce* decision, the Commission has expressly recognized the invalidity of its unduly narrow definition of "members" -- the same definition that it applied to AIPAC in this case. In a recent advisory opinion, the Commission overturned prior rulings to the contrary and concluded that lessees of seats on the Chicago Mercantile Exchange were "members" of the Exchange within the meaning of FECA even though they lacked voting rights. Advisory Op. 1997-5 (May 16, 1997). In reaching that conclusion, the Commission specifically relied on the broader definition of "member" adopted by the court of appeals in the *Chamber of Commerce* case. As the Commission conceded, the court of appeals had "determined that significant portions of [the Commission's regulatory definition] were invalid" because "they defined the term 'member' in an unduly restrictive fashion," and thus the Commission's bright-line voting rights requirement was "now invalid in the District of Columbia Circuit." *Id.* at n.9.[5]

The Commission's determination that AIPAC's members did not qualify as "members" under FECA, and thus that AIPAC could be found to have engaged in election-related communications to non-members, cannot stand in light of the *Chamber of Commerce* decision and the Commission's express recognition of the invalidity of the standard it applied to AIPAC. There can be no doubt about the outcome of any reexamination of that question under the proper legal standards: AIPAC's members qualify as "members" within the meaning of the Act.

It is uncontroverted that AIPAC is a membership corporation under the laws of the District of Columbia and that the individuals to whom AIPAC allegedly made election-related communications qualify as its members in accordance with its bylaws and District of Columbia law. G.C. Br. 81; D.C. Code Ann. §§ 29-512 through 29-514; *see NRWC*, 459 U.S. at 204-05 (looking to state law for guidance in determining meaning of "members" under FECA). It is equally clear that AIPAC expressly solicits and enrolls its members as such and that AIPAC members take af-

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[5] In response to a petition for rulemaking filed with the Commission in February 1997 (*see* 62 Fed. Reg. 13355 (Mar. 20, 1997)), the Commission recently issued an Advance Notice of Proposed Rulemaking requesting "comments on how to revise its rules governing who is a 'member' of a membership association" in light of the *Chamber of Commerce* decision. 62 Fed. Reg. 40982, 40982-83 (Jul. 31, 1997). Comments are due by September 2, 1997, after which time the Commission "may issue a Notice of Proposed Rulemaking . . . seeking comments on specific regulatory language." *Id.* at 40984.

firmative steps to join the organization, pay a substantial amount of annual dues, and receive specific rights and privileges associated with membership, including the right to receive AIPAC publications, participate in AIPAC activities, attend meetings of the Executive Committee and other AIPAC committees, attend AIPAC's annual Policy Conference, and debate and vote on the Policy Statement that sets AIPAC's policy positions for the year. G.C. Br. 77-91, 97-99; G.C. Rep. 19.

Under any interpretation of the term "members" (other than the wooden and unduly narrow construction originally applied by the Commission), it seems clear that AIPAC's members would qualify as such under FECA. The *Chamber of Commerce* decision confirms that dues-paying members who possess the right to participate in policy formulation for their organizations -- a category that plainly includes AIPAC's members -- qualify as "members" under FECA. Moreover, even the Commission's General Counsel found that the payment of dues by AIPAC members "constitutes a significant financial attachment" (G.C. Br. 98) -- a finding that conclusively establishes that AIPAC's members meet the first prong of the disjunctive test for membership suggested by this Court in *NRWC*. *See* 459 U.S. at 204 ("significant financial or organizational attachment").

Given that the Commission found AIPAC's members to present a "close case" even under its prior reading of the Act, it is readily apparent that the Commission would reach a contrary conclusion under its revised view of the law.[6] As a result, there is no

[6] Interestingly, the Commission's advance notice of proposed rulemaking (*see supra* note 5) identified a number of "organizational attachments" as potentially satisfying the requirements for "member" status, including "the right to serve on policy-making boards and/or vote on policy issues" and "eligibility to be elected to governing positions in the organization." 62 Fed. Reg. at 40984. AIPAC's members clearly possess these "organizational attachments" as well.

reason to address the validity of the "major purpose" test in this case, because under no circumstances could AIPAC be found to be a "political committee" or be subjected to an enforcement proceeding under the Act with respect to the conduct giving rise to this case.

II. THE JUDGMENT OF THE COURT OF APPEALS SHOULD BE VACATED AND THE CASE REMANDED FOR DISMISSAL OR RECONSIDERATION

The Commission disposed of respondents' administrative complaint by closing the case without attempting to impose any penalty on AIPAC. As a result, AIPAC had no basis for challenging the Commission's erroneous determination of the membership issue, and did not seek judicial review of that determination.[7] Nonetheless, this Court is not required to ignore reality and decide the case as if the validity of the "major purpose" test would actually affect the ultimate outcome. To the contrary, prudential and justiciability concerns militate strongly in favor of vacatur of the judgment below.[8]

[7] AIPAC did seek to raise the membership issue as *amicus curiae* in the district court, but the court granted the parties' motion to strike AIPAC's *amicus* brief. Pet. App. 78a n.1.

[8] Of course, if the Court were to conclude that respondents lacked standing to challenge the Commission's discretionary decision not to take any enforcement action, there would be no need to consider either the membership issue or the

It is well established that this Court will not decide even a properly formulated and presented constitutional issue if non-constitutional grounds exist for resolution of the case. *See Gulf Oil Co. v. Bernard*, 452 U.S. 89, 99 (1981) ("prior to reaching any constitutional questions, federal courts must consider nonconstitutional grounds for decision"); *Spector Motor Serv. v. McLaughlin*, 323 U.S. 101, 105 (1944) (stating that the constitutional question must be "unavoidable"); *see also Paulussen v. Herion*, 475 U.S. 557 (1986) (per curiam). This fundamental rule arises from the admonition of Article III "'not to decide abstract, hypothetical or contingent questions . . . or to decide any constitutional question in advance of the necessity for its decision . . . or to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied . . . .'" *Rescue Army v. Municipal Court of L.A.*, 331 U.S. 549, 570 n.34 (1947).

Any resolution of the validity of the "major purpose" test would necessarily entail careful consideration of the scope of First Amendment protections for associational activities and political speech. The court of appeals' rejection of the "major purpose" test squarely implicates the concern that "compelled disclosure . . . can seriously infringe on privacy of association and belief guaranteed by the First Amendment." *Buckley v. Valeo*, 424 U.S. 1, 64 (1976); *see Federal Election Comm'n v. Machinists Non-Partisan Political League*, 655 F.2d 380, 393 (D.C. Cir. 1981) (recognizing "grave constitutional difficulties inherent in construing the term 'political committee' to include groups whose activities are not under the control of a

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"major purpose" test. AIPAC expresses no opinion on the standing question.

'candidate' or directly related to promoting or defeating a clearly identified 'candidate' for federal office"); *see generally NAACP v. Alabama*, 357 U.S. 449 (1958); Pet. 17-20.

As this Court held in *Buckley*, "significant encroachments on First Amendment rights of the sort that compelled disclosure imposes cannot be justified by a mere showing of some legitimate governmental interest." 424 U.S. at 64. Resolution of the "major purpose" issue in this case would require the Court to consider whether the governmental interests supporting compelled disclosure of contribution and expenditure data from issue advocacy organizations that arguably engage in a relatively small amount of election-related activity are sufficiently compelling to justify the resulting burdens on free speech and associational rights. The well-established rule against unnecessarily deciding weighty constitutional issues thus counsels against the Court's reaching the "major purpose" issue if any non-constitutional basis for disposing of the case exists.

Plainly, the antecedent statutory question of whether AIPAC's members qualify as "members" under the Act provides a straightforward statutory basis for resolving this case without reaching the constitutional issues directly and necessarily implicated by the "major purpose" question. The fact that this antecedent issue has not been raised or litigated by the parties is not dispositive, because the Court's power to decide cases is not limited by the terms of the questions presented in the petition for certiorari. *See Procunier v. Navarette*, 434 U.S. 555, 559-60 n.6 (1978); *Blonder-Tongue Labs, Inc. v. Univ. of Illinois Found.*, 402 U.S. 313, 320 n.6 (1971) (the Court's Rules "do[] not limit our power to decide important questions not raised by the parties"). In appropriate circumstances, the Court has rested its decision on grounds that were not raised by the parties but were logically antecedent to the ques-

tions presented in the petition for certiorari. *See*, *e.g.*, *Arcadia v. Ohio Power Co.*, 498 U.S. 73, 77-78 (1990); *Teague v. Lane*, 489 U.S. 288, 300 (1989).

Indeed, it is open to question whether the parties have a sufficiently concrete interest in resolution of the "major purpose" issue to permit judicial consideration of that issue in this case. As discussed in the preceding section, intervening changes in the law governing the membership issue have effectively eliminated the possibility that the Court's disposition of this case could grant respondents the relief they claim to be seeking. Regardless of the Court's ultimate answer to the abstract legal question posed by the parties in this case, AIPAC cannot and will not be found to be a "political committee" subject to FECA's broad disclosure obligations, because the conduct giving rise to this case involved communications between AIPAC and its members that are statutorily immune from treatment as "expenditures."

This Court has an "obligation essentially to search the pleadings on core matters of federal-court adjudicatory authority -- to inquire not only into this Court's authority to decide the questions petitioners present, but to consider, also, the authority of the lower courts to proceed." *Arizonans for Official English v. Arizona*, 117 S. Ct. 1055, 1071 (1997). Thus, the fact that the parties and the court below were willing to litigate and resolve the "major purpose" issue does not eliminate this Court's authority or obligation to consider whether intervening developments in the law affecting the antecedent membership issue have effectively rendered this case moot.

"Under Article III of the Constitution this Court may only adjudicate actual, ongoing controversies." *Honig v. Doe*, 484 U.S. 305, 317 (1988); *see also Liner v. Jafco, Inc.*, 375 U.S. 301, 306 n.3 (1964).

An actual controversy must exist at all stages of appellate review. *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 115 S. Ct. 386, 389 (1994). "To satisfy the Art. III case-or-controversy requirement, a litigant must have suffered some actual injury that can be redressed by a favorable judicial decision." *Iron Arrow Honor Soc'y v. Heckler*, 464 U.S. 67, 70 (1983) (per curiam). A case is moot when "the parties lack a legally cognizable interest in the outcome" (*Powell v. McCormack*, 395 U.S. 486, 496 (1969)) or when it is "impossible for the court to grant 'any effectual relief whatever' to a prevailing party." *Church of Scientology v. United States*, 506 U.S. 9, 12 (1992).

This case is unquestionably moot if, as demonstrated above, AIPAC's members qualify as "members" under FECA as newly interpreted by the Commission and the federal courts. Under these circumstances, the proper disposition of the case is clear: the Court should vacate the judgment of the court of appeals and remand with directions that respondents' complaint be dismissed as moot. *See*, *e.g.*, *Arizonans for Official English v. Arizona*, 117 S. Ct. at 1071; *Deakins v. Monaghan*, 484 U.S. 193, 200 (1988); *Mechling Barge Line v. United States*, 368 U.S. 324, 329 (1961); *United States v. Munsingwear Inc.*, 340 U.S. 36, 39 (1950). The Court has consistently followed this course where, as here, an intervening change in the law has caused a case to "'los[e] its character as a present, live controversy of the kind that must exist if we are to avoid advisory opinions on abstract propositions.'" *Diffenderfer v. Central Baptist Church*, 404 U.S. 412, 414 (1972) (per curiam); *see, e.g.*, *Frank v. Minnesota Newspaper Ass'n, Inc.*, 490 U.S. 225, 226 (1989) (per curiam); *Munsingwear*, 340 U.S. at 39-41; *see also*

Commercial Cable Co. v. Burleson, 250 U.S. 360, 362-63 (1919).[9]

Even if there were some remaining doubt about the proper resolution of the antecedent "membership" question, vacatur would nonetheless be the proper course in this case. Under any view of the law, it is highly doubtful that this Court's resolution of the "major purpose" issue would have any impact on the ultimate outcome of the case. Neither the court below nor the Commission itself has had any opportunity to consider the effect of the evolving legal test for membership status on the issues presented in this case, and it is at least likely -- indeed, certain, in AIPAC's view -- that consideration of that issue would obviate the need to consider the "major purpose" test.

In similar circumstances, this Court has found it appropriate to vacate the judgment below and remand for reconsideration in light of intervening legal developments. *See, e.g., Bureau of Econ. Analysis v. Long*, 454 U.S. 934 (1981) (vacating and remanding for further consideration in light of an intervening statutory enactment); *Dupris v. United States*, 446 U.S. 980 (1980) (vacating and remanding for consideration of potential mootness). An administrative agency's change in its interpretation of a federal statute is

[9] To be sure, the Commission has an institutional interest in obtaining a final judicial determination of the validity of the "major purpose" test -- in the same sense that litigants frequently have an interest in obtaining advisory opinions from this Court on important legal issues that could affect other cases. Article III of the Constitution does not, however, permit this approach to judicial decisionmaking. *See Lewis v. Continental Bank Corp.*, 494 U.S. at 479 ("the Article III question is not whether the requested relief would be nugatory as to the world at large, but whether [the plaintiff] has a stake in that relief").

clearly an appropriate ground for exercise of this authority. *See, e.g., Lawrence ex rel. Lawrence v. Chater*, 116 S. Ct. 604, 606-10 (1996); *see also City of Chicago v. Environmental Defense Fund*, 506 U.S. 982 (1992).

Accordingly, under any view of the law, the Court should not accept the parties' invitation to address the weighty constitutional issues inherent in deciding the validity of the "major purpose" test. Instead, the Court should vacate the judgment of the Court of Appeals and remand for dismissal of respondents' complaint or for reconsideration of the antecedent membership issue in light of intervening developments in the interpretation and application of FECA's statutory exemption for communications with "members."

CONCLUSION

For the reasons set forth above, the judgment of the court of appeals should be vacated and the case remanded with directions to dismiss respondents' complaint or, in the alternative, to remand the case to the Commission for it to make clear that all of AIPAC's members qualify as "members" within the meaning of FECA.

Respectfully submitted.

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